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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MANUEL DEJESUS TURCIOS, Defendant and Appellant.	B203552 (Los Angeles County Super. Ct. No. BA281780)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman J. Shapiro, Judge, and Paul Enright, Temporary Judge (pursuant to Cal. Const. art. VI, § 21). Affirmed.

Robert M. Sweet, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Linda C. Johnson, Deputy Attorneys General, for Plaintiff and Appellant.

Manuel Dejesus Turcios appeals from the judgment imposed for his convictions by jury of attempted premeditated and deliberated murder, kidnapping, and robbery. Sentenced to a term of life plus nine years, appellant contends that the evidence was legally insufficient to establish attempted murder, and that the trial court erred in not instructing the jury that they had to agree unanimously about the act constituting that offense. We find these contentions unmeritorious, and in part barred by the law of the case. We affirm the judgment.

FACTS

In a previous appeal in this case, we reversed the trial court's grant of a new trial on the attempted murder count. (*People v. Turcios* (July 12, 2007, B191412) [nonpub. opn.].) We begin by reiterating the statement of facts from our prior opinion.[1]

At about 5:30 a.m on April 12, 2005, appellant and an unidentified accomplice assaulted and kidnapped the victim, Julio Hernandez, near his Los Angeles home. An eyewitness saw Hernandez repeatedly beaten, and then bound and gagged with duct tape, and forced into appellant's pickup truck. Either appellant or his cohort had a knife. Hernandez identified him as appellant, who put it to his neck and said, "If you move, you die." According to Hernandez, appellant struck him and knocked him down, proceeded to tape his head, while the accomplice handcuffed his hands behind him and taped his feet together. A pillowcase went over Hernandez's head as he was put into the truck.

Hernandez testified that appellant then drove the truck, for over three hours, leaving Hernandez on the rear floorboard, above which the accomplice sat. He kicked Hernandez in the face, ribs and stomach, and took a ring, watch, cell phone and some money from him.

After about three and one-half hours, the truck turned onto a gravel road for 10 minutes. After the accomplice said it was okay, appellant started to pull Hernandez out of the truck, head first. But barking dogs were heard, and the truck proceeded for another

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[1] In so doing, we substitute "appellant" for "respondent" when referring to appellant, and make a few other nonsubstantive, cosmetic changes.

10 minutes, again stopping on gravel. Appellant twice struck Hernandez's head with the truck's door, and his head became swollen and began to bleed. When the truck stopped again in five minutes, Hernandez was in great pain, bleeding from the handcuffs and from cuts on his fingers (he had tried to grab the knife at the outset), and with his feet and arms swollen. Appellant and his accomplice pulled Hernandez out of the truck, and he struck the ground hard on his head. Appellant raised the approximately eight-inch knife and placed it toward Hernandez's neck. But a car then pulled up and parked. Appellant desisted, and told his accomplice, "This asshole just got saved by the bell."

Appellant and the accomplice drove away, leaving Hernandez bound, gagged, restrained, and with the pillowcase over his head. Hernandez rolled for 10 or 15 minutes, to a road where he fell onto the pavement. Chewing through the tape over his mouth, he cried for help. A woman drove up, and others came. Hernandez testified he was in a solitary location.

Taken to the Mexican Red Cross, Hernandez received stitches and restorative blood. He was then driven to the border, where Los Angeles Police Officer Juvey Mejia picked him up and returned him to Los Angeles. During an interview with police the next morning, Hernandez stated that the accomplice had approached him with a knife when the truck stopped. The previous afternoon Officer Mejia had found appellant, in Los Angeles, scrubbing his truck, from which the officer recovered duct tape and rope.

Hernandez testified appellant had been dating Hernandez's estranged wife. The two men had had an angry phone conversation before the abduction, and Hernandez's wife had previously threatened him that he would leave the country "through the big door." Hernandez had written down the license number of appellant's truck before the kidnapping, and that led police to locate appellant. DNA from blood on one of his shoes matched Hernandez's.

Appellant presented no affirmative defense. In denying his motion for acquittal on the attempted murder count, the court stated, "I think that there's sufficient evidence based upon the 'saved by the bell' . . . ."

During closing argument, the prosecutor singled out the final incident with the knife as constituting the attempted murder. However, in discussing intent to kill, the prosecutor referred to appellant's leaving Hernandez without any money or telephone with which to get help. The prosecutor added, "Basically, all the circumstances show that the victim was left to die in this remote area of Tijuana."

The jury was instructed on aiding-abetting, in part because of Hernandez's differing statements about which of his captors had wielded the knife. The jury convicted appellant of all three offenses, but found not true an allegation that he had used a knife in the attempted murder.

Appellant filed a motion for new trial. Regarding the attempted murder count, appellant argued that the "by the bell" episode was insufficient to show specific intent to kill, or an act so intended. At the hearing, the prosecutor repeated her position that, insofar as intent was concerned, leaving Hernandez alone would be enough to show both intent and attempted murder.

In remarks summarizing the issues, the court stated it believed that the prosecutor's "entirely new theory" about attempted murder was insufficient. The court added, "Had I known there was gonna be during the argument this argument that frankly may not have been supported by the evidence, probably a unanimity instruction should be given and the jury would find aiding abetting on the theory that he was on the side of the road. The problem with the side of the road theory is factually I don't know if the evidence supports the verdict."[2] After further reflections, the court concluded, "[B]ut because of that laying on the side of the road, I don't think . . . I'm comfortable finding that specific intent to murder, and the jury may have, in fact, subscribed to that theory." The court then granted the motion for new trial on attempted murder. (End of prior opinion's fact statement.)

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[2] The court believed that the negative finding on knife use meant that the jury had found respondent guilty as an aider-abetter. This was not necessarily so. (See, e.g., *People v. Lopez* (1982) 131 Cal.App.3d 565.)

At this point, the court sentenced appellant to a nine-year aggregate term for his kidnapping and robbery convictions. The prosecution appealed from the new trial order. We reversed it, reinstating the attempted murder conviction. We did so for two reasons.

First, assuming the trial court correctly held that the "left by the road" evidence was insufficient to show attempted murder, the jury would be presumed to have rejected that factually insufficient theory, and to have found the sustainable one, involving the knife and "saved by the bell." A new trial therefore would not be warranted. (See *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*); *Griffin v. United States* (1991) 502 U.S. 46.)

Second, we ruled that the evidence regarding Hernandez being "left by the road" did constitute substantial evidence of attempted murder. We concluded: "The evidence as a whole showed a scheme to brutally abduct Hernandez to Tijuana, and there 'get rid of him.' From the standpoint of specific intent and sufficient act, the leaving of Hernandez near the roadside constituted attempted murder." (*People v. Turcios*, *supra*, B191412, at p. 5.)

On remand, the trial court sentenced appellant to a life term for the attempted murder, to run consecutively to the nine years for the other two counts. Plaintiff appeals from that judgment.

DISCUSSION

1. Sufficiency of Attempted Murder Evidence

Appellant's initial arguments, regarding sufficiency of the evidence, effectively challenge our rulings in the previous appeal. Because those rulings are the law of the case, and we see no grounds for reconsidering them, appellant's efforts to refute them are unavailing.

Appellant's first argument is based on *Guiton*, *supra*, 4 Cal.4th 1116. Under *Guiton*, if the jury could have rendered a conviction on either of two theories, one of which was deficient, the conviction must be reversed if the deficiency was legal. But if the second theory was factually deficient (i.e., evidentiarily unsupported), reversal is not required. In our previous decision, we applied the second prong of *Guiton* to the "by the

road" theory, assuming it to be (as the trial court had) factually insufficient to establish attempted murder. We consequently ruled that a new trial was unnecessary.

Presently, appellant argues that the "by the road" theory was *legally* deficient, and therefore the conviction must be reversed, under the first prong of *Guiton.* But just as we previously found that theory factually sufficient to support the attempted murder conviction, we see no basis for now ruling that it was "legally insufficient." Appellant actually challenges only the factual support for certain elements of the offense. Thus, apart from semantics, appellant's argument simply seeks to reverse our previous appraisal of the *Guiton* issue. The doctrine of law of the case precludes such relitigation. (See 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 145, p. 392.)

Appellant's second argument is that substantial evidence does not support the conviction based on the "by the road" theory. Here, appellant simply interprets the evidence in a manner different from the views underlying our previous ruling that the evidence was sufficient. Once more, appellant's contention is barred by the law of the case.

2. Unanimity Instruction.

Appellant's remaining contention is that it was prejudicial error not to instruct the jury, in accordance with CALJIC No. 17.01 or CALCRIM No. 3500, that to convict appellant of attempted murder they had to agree concerning the particular act he committed (unanimity instruction).[3] Appellant contends the instruction was necessary because the evidence showed two distinct acts that could have constituted the offense, the "saved by the bell" use of the knife, and the abandonment of the victim "by the road."

This contention cannot be summarily dismissed. The requirement of a unanimity instruction, which implements the constitutional entitlement to conviction by a unanimous jury (5 Witkin & Epstein, Cal. Criminal Law, *supra*, Criminal Trial, § 645, p. 927), has been held applicable to such uncomplicated situations as a charge of

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[3] Where apposite, a unanimity instruction must be given whether or not requested. (5 Witkin & Epstein, Cal. Criminal Law, *supra*, Criminal Trial, § 615, p. 879.)

possession of a firearm by an ex-felon (Pen. Code, § 12021), in whose home several guns were simultaneously found. (*People v. Crawford* (1982) 131 Cal.App.3d 591, 595-596.) In the present case, the parties and the court assessed separately the sufficiency of putting a knife to Hernandez's throat and then abandoning him bound and gagged. These acts might be viewed as within the contemplation of a unanimity instruction.

Nevertheless, we conclude that a unanimity instruction was not required. An established exception to the requirement applies where the multiple acts are part of a "continuous course of conduct, whose acts were so closely connected in time as to form part of one transaction." (*People v. Maury* (2003) 30 Cal.4th 342, 423.) For example, in *Maury* the Supreme Court held that a unanimity instruction had not been required in a murder case, in which the cause of death had been either strangulation, a blow to the head, or a combination of the two, and where the defendant variously admitted and denied strangling the victim, and gave various accounts of her being hit in the head with a rock. (*Id.* at pp. 422-423.)

People v. Haynes (1998) 61 Cal.App.4th 1282 (*Haynes*) is both instructive and apposite. The defendant was convicted of aiding and abetting a robbery. The robber tried to take a handful of currency from a parked driver, and when the victim drove away the money tore in half. The defendant proceeded to drive the robber in pursuit of the victim, making several turns before stopping next to him. The robber got out, struggled with the victim, and extracted the rest of the cash from him.

The Court of Appeal rejected the defendant's contention that a unanimity instruction should have been given, and held that even if the evidence could be viewed as showing two robberies, the continuous conduct exception was applicable. "The two encounters were just minutes and blocks apart and involved the same property. The acts were successive, compounding, part of a single objective of getting all the victim's cash, charged as a single robbery, and arguably barred from multiple punishment by Penal Code section 654. Plus, none of the loot was carried away to a place of temporary safety until all of it was obtained. . . . [N]o unanimity instruction was needed on these facts." (*Haynes*, *supra*, 61 Cal.App.4th at p. 1296.)

In parallel fashion, the brandishing of the knife and the leaving Hernandez by the road occurred in immediate succession, at the same place. They were directed at a single objective of eliminating Hernandez. As in *Haynes*, *supra*, 61 Cal.App.4th 1282, the requirement of a unanimity instruction did not apply to this evidence of a continuous course of conduct.

DISPOSITION

The judgment is affirmed.

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COOPER, P. J.

We concur:

FLIER, J.

BIGELOW, J.